No. 34

In the Supreme Court of the United States

OCTOBER TERM, 1911

SEATTLE MILLS SECURITIES CORPORATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

CITATIONS

Cases.

Cases—Continued. Page

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 13–23) is reported in 38 B. T. A. 623. The opinion of the Circuit Court of Appeals (R. 42) is reported in 117 F. (2d) 62.

JURISDICTION

The judgment of the Circuit Court of Appeals reversing the decision of the Board of Tax Appeals was entered December 7, 1940 (R. 75), and its judgment denying the subsequent motion of

the taxpayer for a judgment affirming the decision of the Board of Tax Appeals was entered January 3, 1941 (R. 79). The petition for certiorari was filed March 5, 1941, and was granted March 31, 1941 (R. 80). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether there may be deducted as an ordinary and necessary expense under Section 23 (a) of the Revenue Act of 1928 payments to persons engaged by the taxpayer to provide publicity and prepare propaganda as an aid to the taxpayer's undertaking, pursuant to a contingent fee contract, to obtain the enactment of congressional legislation beneficial to its principal.

2. Whether a circuit court of appeals may be composed of all the circuit judges of the circuit in active service, more than three in number, sitting *en banc*.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 53–60.

STATEMENT

This case involves income tax liability of the petitioner and was brought to the court below by the Government's petition to review an order of the Board of Tax Appeals. The case was origi-

nally heard below by a court composed of three circuit judges. Thereafter, that court acting pursuant to its Rules 4 and 5, *infra*, pp. 59–60, entered an order restoring the case to the calendar for reargument before the court *en banc* (R. 41). The case was then heard by a court composed of the five circuit judges in the circuit in active service. The decision of the court was in favor of the Government with two judges dissenting. The taxpayer thereupon filed a motion for the entry of a judgment in its favor to be ordered by a court comprised of the two dissenting judges; but those two judges themselves denied the motion (R. 76–79).

The facts relating to petitioner's income tax liability, as stipulated (R. 29–38), and found by the Board (R. 14–17), may be summarized as follows:

The taxpayer, a Delaware corporation, was engaged in various business activities, including trading in securities, investing in domestic and foreign properties, and acting as agent for foreign and domestic principals (R. 14, 29). Its officers, who were also its sole stockholders, were officers, directors, or stockholders of one or more manufacturing corporations in the textile industry (R. 29–30).

In 1924 the taxpayer, through personal contacts of its officers, was employed to represent certain German textile interests whose properties in the

United States had been seized during the World War under the provisions of the Trading with the Enemy Act, October 6, 1917, 40 Stat. 411. The purpose of the employment was to procure legislation which would permit the ultimate recovery of the properties. The properties had an aggregate value of $60,000,000. It was agreed that the taxpayer would bear all costs and expenses incident to the undertaking, and would receive as compensation ten per cent of the amount or value of such property as it might succeed in recovering. The contracts would terminate at the close of the second session of the Sixty-ninth Congress unless in the meantime appropriate legislation had been enacted (R. 14).

In conducting the campaign to procure the enactment of the desired legislation, the taxpayer engaged the services of various persons and organizations, including Ivy Lee, Warren F. Martin, and J. Reuben Clark.[1] The Ivy Lee organization was employed to handle matters of publicity, including the making of arrangements for speeches, and contacting the press in respect of editorial comments and news items. Warren F. Martin, a former special assistant to the Attorney General and J. Reuben Clark, a former solicitor of the State Department, were employed in connection with the preparation of propaganda con-

[1] References are also made in the stipulation and the Board's findings to the activities of F. W. Mondell, but there is no issue before the Court as to deduction for payments to him.

cerning international relations, treaty rights, and the historical policy of the United States relative to enemy-owned property in time of war (R. 14–15).

A bill for the settlement of war claims was introduced and passed the House of Representatives during the second session of the Sixty-ninth Congress and was favorably reported to the Senate by the Senate Finance Committee, but had not passed that body when Congress adjourned on March 4, 1927 (R. 15).

Thereafter, and prior to the opening of the first session of the Seventieth Congress on December 5, 1927, the taxpayer undertook to negotiate new contracts similar in terms to those which had expired. New contracts were procured from many of its former principals, but on less favorable terms. The new contracts provided for the payment of 3 per cent of the amount or value of property received by the claimant and for an additional 2 per cent in respect of money or property paid over to the claimant within one year after enactment of the desired legislation. They also required that the taxpayer pay all costs and expenses. The new agreements were to run for a period of three years beginning January 1, 1928[2] (R. 15).

Without further arrangement or agreement, Lee, Martin, and Clark continued their work after

[2] An example of the new contract appears at R. 32–34.

the close of the second session of the Sixty-ninth Congress on March 4, 1927. The objective of the campaign was accomplished during the Seventieth Congress by the passage of the Settlement of War Claims Act of 1928, March 10, 1928, 45 Stat. 254 (R. 15–16).

During 1929 Ivy Lee was credited on the taxpayer's books with $50,000 for services rendered in connection with the contracts mentioned, and payments in respect to that sum were made to him. In its return, however, the taxpayer claimed as a deduction only $45,000 of the $50,000 item. In 1930 Martin and Clark were credited on the taxpayer's books with $40,000 and $7,500, respectively, as compensation for services rendered in connection with the above contracts and the amounts so credited were taken by the taxpayer as deductions on its 1930 return (R. 16). The taxpayer kept its books and filed its income tax returns on the accrual basis of accounting (R. 29).

The deductions thus taken in 1929 and 1930 exceeded the taxpayer's net income, thereby producing a net loss in each of those years. (R. 9–10.) Pursuant to statutory provisions then in force (Section 117 of the Revenue Act of 1928, 45 Stat. 791), a net loss could be carried forward two years and applied against income for such succeeding years. The tax year here involved is the year 1931, and the question presented is whether the deductions were properly taken in 1929 and

1930, since the net losses resulting therefrom would wipe out petitioner's 1931 taxable income (R. 16).

In determining the deficiency here involved the Commissioner reduced the net losses for 1929 and 1930 by disallowing the deductions claimed in respect to the amounts credited to Lee, Martin, and Clark. The Board of Tax Appeals expunged the deficiency (R. 17), but its judgment was reversed by the court below (R. 75).

SUMMARY OF ARGUMENT

I

The decision of the court below denying the deductions for lobbying expenses was clearly correct. The taxpayer has the burden of overcoming the Commissioner's determination that these were not "ordinary and necessary" expenses. *Welch* v. *Helvering*, 290 U. S. 111. It has not carried that burden here. Moreover, the Commissioner's determination is supported by official Treasury rulings of long standing which must be given the effect of law unless plainly in conflict with the statute.

Even apart from the regulations, there is no basis for reversal of the Commissioner's determination that these expenses were not "ordinary and necessary." The expenditures were incurred in an undertaking of a character which cannot be said to have been of common and frequent occurrence in the type of business in which the tax

payer was engaged. Corporate funds are not ordinarily advanced on a broad gamble, pursuant to a contract of at least doubtful legality, that the enactment of legislation favorable to the claims of foreign principals can be obtained. Moreover, this point aside, it cannot be said that it is an "ordinary and necessary" expense of an appeal to Congress that funds be spent for the employment of so-called public relations counsel, etc. for the preparation and dissemination of propaganda.

Decisions in numerous analogous cases support the view that expenditures of an illegal character or with respect to an enterprise against public policy are not "ordinary and necessary" within the meaning of the statute.

II

Under Section 117 of the Judicial Code, it is provided that a circuit court of appeals "shall consist of three judges, of whom two shall constitute a quorum." By a 1912 amendment to Section 118 it is provided that "The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit * * *." The court below construed the 1912 amendment of Section 118 as impliedly modifying Section 117 so that each court should consist of the total number of circuit judges within the circuit.

We think that it is dubious whether the 1912 amendment was intended to accomplish that

result, and inferences to be drawn from the face of the statute are, at best, conflicting. However, there are strong considerations of public policy in support of the result reached by the court below, and since the interpretation is a permissible one, we urge that it be approved by this Court.

ARGUMENT

I

THE DEDUCTIONS ON ACCOUNT OF LOBBYING EXPENSES WERE PROPERLY DISALLOWED

1. Petitioner incurred various expenses for lobbying which it seeks to deduct from gross income as "ordinary and necessary" expenses under Section 23 (a) of the Revenue Act of 1928. At the very outset it should be borne in mind that, since deductions from gross income are a matter of legislative grace, the taxpayer has the burden of establishing the right to the deduction. *New Colonial Co.* v. *Helvering,* 292 U. S. 435, 440; *White* v. *United States,* 305 U. S. 281, 292. And it is firmly settled that deductions or exemptions must be construed strictly against one claiming the benefit thereof. "There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well-founded doubt is fatal to the claim; * * *." *Bank of Commerce* v. *Tennessee,* 161 U. S. 134, 146; see also *United States* v. *Stewart,* 311 U. S. 60, 71.

The question in the instant case can perhaps be most profitably explored against the background of this Court's decision in *Welch* v. *Helvering*, 290 U. S. 111, which contains probably the most comprehensive and authoritative judicial consideration of what constitutes an "ordinary and necessary" expense. There the taxpayer had been an officer in a corporation which had been adjudged an involuntary bankrupt and relieved of its debts. Thereafter, the taxpayer began to transact business on his own account and, in order to reestablish relations with customers whom he had known when acting for the corporation, undertook voluntarily to pay the corporate debts. The Commissioner of Internal Revenue ruled that such payments were not deductible from taxable income as ordinary and necessary expenses. This Court assumed that the expenses were "necessary," but sustained the Commissioner since they were not "ordinary." Mr. Justice Cardozo said (pp. 114-115):

> Men do at times pay the debts of others without legal obligation or the lighter obligation imposed by the usages of trade or by neighborly amenities, but they do not do so ordinarily. * * *. Here, indeed, as so often in other branches of the law, the decisive distinctions are those of degree and not of kind. One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the

> statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle.
>
> The Commissioner of Internal Revenue resorted to that standard in assessing the petitioner's income, and found that the payments in controversy came closer to capital outlays than to ordinary and necessary expenses in the operation of a business. His ruling has the support of a presumption of correctness, and the petitioner has the burden of proving it to be wrong. *Wickwire* v. *Reinecke*, 275 U. S. 101; *Jones* v. *Commissioner*, 38 F. (2d) 550, 552. Unless we can say from facts within our knowledge that these are ordinary and necessary expenses according to the ways of conduct and the forms of speech prevailing in the business world, the tax must be confirmed. But nothing told us by this record or within the sphere of our judicial notice permits us to give that extension to what is ordinary and necessary. * * *

2. The lobbying expenses in the instant case similarly fail to qualify as "ordinary and necessary" expenses within the statute. Here, as in the *Welch* case, the Commissioner has ruled that the expenditures are not deductible, and his determination must stand unless, in the language of that decision, the Court can say from facts within its knowledge "that these are ordinary and necessary expenses according to the ways of conduct and the forms of speech prevailing in

the business world." That petitioner cannot meet the burden recognized in the *Welch* case and that judicial notice can hardly produce the facts necessary to overcome the Commissioner's determination seem almost too clear for serious dispute. Moreover, as will be shown, *infra*, p. 17, contracts for procuring the very legislation involved in these lobbying expenditures have been held to be against public policy and therefore illegal. This additional fact alone when considered in the light of the familiar practices of lobbyists would justify the Court in refusing to treat these expenses as "ordinary," wholly apart from any prior determination of the Commissioner.

But in this case we have more than a mere determination of the Commissioner that these expenses are not deductible: There is present here an official Treasury regulation of long standing which in unambiguous language declares that expenditures "for lobbying purposes, the promotion or defeat of legislation, * * * are not deductible from gross income." Article 262 of Regulations 74

From almost the inception of the present income-tax law, the Treasury has ruled that amounts spent for lobbying are not "ordinary and necessary expenses." The first published ruling appeared in a Treasury Decision, dated January 30, 1915, which declared that "Sums of money expended for lobbying purposes and contributions

for campaign expenses are held not to be an ordinary and necessary expense in the operation and maintenance of the business of a corporation, and are therefore not deductible from gross income * * *." T. D. 2137, 17 Treasury Decisions, Internal Revenue, pp. 48, 57–58. This determination, elaborated to refer expressly to expenditures for "the promotion or defeat of legislation," and "the exploitation of propaganda" was incorporated as Article 143 in Regulations 33 (Revised, 1918). The regulation assumed its present form in Article 562 of Regulations 45, under the Revenue Act of 1918, and has since appeared, without change, in all successive regulations.[3] See Article 562 of Regula-

[3] Petitioner makes much of the fact that Article 262 of Regulations 74 under the 1928 Act, here involved, is entitled "Donations" and deals in large part with charitable contributions by corporations (Br. 26 *et seq.*). But the specific provisions of the regulations relied upon by the Government had their origin in T. D. 2137 and Article 143 of Regulations 33, where it was expressly stated that they were an interpretation of the phrase "ordinary and necessary."

Beginning with the Revenue Act of 1921, the provisions were incorporated for reasons of convenience in the Article entitled "Donations." Prior to 1928, there were separate provisions in the revenue acts dealing with expenses allowable to individuals and expenses allowable to corporations, though the provisions were identical. See, e. g. Sections 214 (a) (1) and 234 (a) (1) of the Revenue Act of 1926. Moreover, the revenue acts provided for deductions to individuals on account of charitable contributions, but made no such provision for similar donations by corporations. However, it was recognized that such donations might, in some circum-

tions 62, 65 and 69; Article 262 of Regulations 74 and 77; Article 23 (o)–2 of Regulations 86; and Article 23 (q)–1 of Regulations 94 and 101, promulgated under the Revenue Acts of 1921, 1924, 1926, 1928, 1932, 1934, 1936, and 1938, respectively.

The regulations thus represent a contemporaneous and long-continued administrative interpretation of the statute. Not only are they entitled to great weight as such but, under the familiar rule, the successive reenactments of the statute lend even greater weight to their validity. Cf. *Morgan* v. *Commissioner*, 309 U. S. 78, 81; *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Old Mission Co.* v. *Hel-*

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stances, qualify as "ordinary and necessary" business expenses of a corporation. Accordingly, there appeared in the regulations, under the statutory provisions relating to corporate deductions, an article indicating when such donations were deductible as expenses; and since lobbying expenses were thought to be loosely related to such contributions the provisions dealing therewith were likewise incorporated in the same article. But it is clear that the article was spelling out when such expenditures might or might not be deductible as "ordinary and necessary" business expenses.

In 1928, the structure of the revenue act was simplified, and expense deductions for corporations as well as individuals were incorporated in a single section, namely, Section 23 (a). Under the reorganized structure, charitable contributions by individuals were dealt with in Section 23 (n), and for functional reasons only, it was thought to be more desirable to continue the regulations here involved in juxtaposition with regulations construing Section 23 (n). But it is clear from the origin of these provisions as well as their content that they are concerned with the question whether lobbying expenses are deductible as "ordinary and necessary" business expenses.

vering, 293 U. S. 289, 293, 294. The Circuit Court of Appeals for the Ninth Circuit has so held with respect to the very regulations here involved. *Sunset Scavenger Co.* v. *Commissioner*, 84 F. (2d) 453; cf. *Old Mission P. Cement Co.* v. *Commissioner*, 69 F. (2d) 676, 681.[4]

That the regulations are in accord with the understanding of Congress is further confirmed by the enactment of Section 23 (q) of the Revenue Acts of 1936 and 1938. Prior to 1936, a charitable contribution by a corporation was deductible only if it could be treated as an "ordinary and necessary" business expense. Cf. *Helvering* v. *Evening Star Newspaper Co.*, 78 F. (2d) 604 (C. C. A. 4th), certiorari denied, 296 U. S. 628; Article 23 (o)-2 of Regulations 86, promulgated under the Revenue Act of 1934. Section 23 (q) now specifically permits such deductions, within specified limits, provided that "no substantial part of the activities" of the donee "is carrying on propaganda, or otherwise attempting, to influence legislation." Implicit in this proviso is the assumption that funds otherwise used for such purposes are not deductible. In the very least, it reflects a Congressional policy, which is relevant in construing the cognate provisions in Section 23 (a). Cf. *United States* v. *Pleasants*, 305 U. S. 357, 362, 363;

[4] Affirmed on other issues, 293 U. S. 289. This Court, in effect, denied certiorari on this issue in the *Old Mission* case when it limited the writ. 293 U. S. 544.

Keifer & Keifer v. *R. F. C.*, 306 U. S. 381, 391.

3. Apart from the regulations and the determination of the Commissioner, it cannot be concluded that the undertaking, which gave rise to these expenses, was "of common or frequent occurrence" in the type of business in which the taxpayer was engaged. *Deputy* v. *du Pont*, 308 U. S. 488, 495. The taxpayer, according to the stipulation of facts, was engaged "in various business activities, including trading in securities, investing in domestic and foreign properties, and acting as agent for foreign and domestic principals" (R. 29). There is nothing to indicate that enterprises of this type commonly incur expenses for lobbying activity under the type of arrangement involved here.

The taxpayer undertook to represent the various foreign principals on the basis of a broad gamble. It would endeavor to procure the enactment of legislation, favorable to its principals, solely on a contingent basis, and it would advance all costs and expenses. Unless the taxpayer were successful, it would receive nothing for its efforts, and it would be out of pocket whatever the costs might be. On the other hand, if it were successful, it would share on a percentage basis in a recovery which could reach almost astronomical proportions.

Speculation, of course, is not unusual in business, and paid lobbyists are a familiar phenom-

enon. But it has long been recognized that the two do not mix. And it has twice been held that contracts similar to the taxpayer's for services in connection with the very same legislation were illegal. *Gesellschaft Fur Drahtlose Telegraphie, M. B. H.* v. *Brown*, 78 F. (2d) 410 (App. D. C.), certiorari denied, 296 U. S. 618; *Brown* v. *Gesellschaft Fur Drahtlose Tel., M. B. H.*, 104 F. (2d) 227 (App. D. C.), certiorari denied, 307 U. S. 640. That result is in accord with the numerous decisions holding invalid contingent-fee contracts to procure the enactment of legislation or government contracts. E. g., *Crocker* v. *United States*, 240 U. S. 74; *Hazelton* v. *Sheckells*, 202 U. S. 71; *Trist* v. *Child*, 21 Wall. 441; *Marshall* v. *Baltimore & Ohio Railroad Co.*, 16 How. 314; *Noonan* v. *Gilbert*, 68 F. (2d) 774 (App. D. C.). Even if, as some contend, the mere fact of contingency is not sufficient to make the undertaking illegal, it is nevertheless a strong circumstance,[5] and in this case it is coupled with the further fact that the taxpayer was itself to finance the undertaking, an added factor which would certainly make for illegality.

But whether or not this type of undertaking has otherwise been condemned as against public policy, and whether or not the agreement would be enforceable as between the taxpayer and its prin-

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[5] See 6 Williston on Contracts (Rev. Ed. 1938) 4881–4882; Restatement of Contracts, Sec. 563.

cipals, it is evident that the engagement was of an uncommon character. In normal business operations, even those which include representation of foreign concerns, corporate assets are not ordinarily expended on the gamble that particular Congressional action can be obtained for the benefit of such concerns. Only an excess of cynicism can warrant the conclusion that such operations normally embrace undertakings of at least questionable validity and of at least dubious social and political implications. Irrespective of the explanation that may be advanced for the terms on which the taxpayer entered into the arrangement, it can only be regarded as an unusual one.

Moreover, even if it is assumed that this was an undertaking of a common and frequent type, certainly these particular expenditures are not the "ordinary" expenses of an appeal to Congress. The deductions here involved relate solely to fees for publicity and propaganda. Publicists and propagandists at times perhaps do play an important role in connection with efforts to obtain legislative action. It may well be that it was "helpful" to the taxpayer, in its efforts here, to expend funds for the services of a so-called public-relations counsel to handle matters of publicity "including the making of arrangements for speeches and speakers around the country, cooperating with the Press in editorial comments, as well as news items, and work of a general public-

ity nature" (R. 31). It may also well be that it was helpful to expend funds for the preparation "of propaganda concerning international relations, treaty rights, and the historical policy of the United States relative to enemy-owned property in times of war" (R. 31). Elaboration of the vicious tendencies inherent in this type of high-pressure tactics is not necessary here.[6] They

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[6] That the type of legislation procured by such tactics frequently turns out against the public interest is strikingly illustrated here. The petitioner represented German aliens whose property had been seized by the United States during the World War. Although it was probably contemplated that such property would ultimately be restored to the original owners, it was meanwhile being held as security against the large claims that this country had against Germany arising out of the war, such as claims with respect to German sabotage of American industry, German seizure of American property, etc. The Joint Resolution of July 2, 1921 (42 Stat. 105), which terminated the war between the two countries, reserved to the United States and its nationals all rights, indemnifications and damages to which they were entitled under the Treaty of Versailles; and the peace treaty which followed, the Treaty of Berlin, concluded on August 25, 1921 (42 Stat. 1939), secured to the United States the rights reserved under the Joint Resolution, and recognized that the seized German property would be held until the German Government should make suitable provision for the satisfaction of the American claims. Thereafter, on August 10, 1922, in pursuance of the Treaty of Berlin, the United States and Germany entered into an Agreement (42 Stat. 2200) providing for the establishment of a Mixed Claims Commission to ascertain the amount to be paid by Germany in satisfaction of its financial obligations to the United States. Although the Commission had not yet completed its work and although there were still outstanding large American claims that had

were sufficiently summarized by the court below when it said (R. 46–47):

> Obviously these news items and editorial comments did not appear under the stated sponsorship of the taxpayer or its clients. The reader of such news comments and editorials including members of Congress could not have known that they emanated from a source inspired by self-interest. Such practices *tend* to poison public opinion and should be condemned.

The decisive fact is that petitioners seeking relief from Congress daily present their cases without this form of insidious assistance. There is therefore no foundation for the contention that ex-

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not yet been satisfied, there developed a strong movement inspired from German sources to persuade Congress to return the German property at once. That movement culminated in the Settlement of War Claims Act of 1928, 45 Stat. 254, which was the object of petitioner's lobbying contracts. Under that statute 80% of the German property was returned and only 20% together with certain other funds was retained to pay the awards of the Mixed Claims Commission. In lieu of the property returned Germany gave its unsecured obligations. However, it soon became apparent that the claims of the American nationals were far in excess of the funds available for payment of the American claims, and that Germany would not live up to her promise contained in the unsecured obligations. Accordingly, many millions of dollars in American claims remain unpaid to this day and that legislation has produced such ironic litigation as *Z. & F. Assets Corp. v. Hull*, 311 U. S. 470 (the *Black Tom* and *Kingsland* cases), in which American award-holders have competed with each other for the remaining insufficient funds.

penditures for such purposes are the "ordinary" incidents of a legislative appeal.

4. Finally, the correctness of the result below is confirmed by a number of decisions denying the deduction of expenditures incurred in connection with an activity which was illegal or contrary to public policy. Those decisions, while not necessarily conclusive, are helpful in showing that such expenditures cannot be regarded as "ordinary" within the meaning of the statute.

Thus it has been held that fines or penalties paid by the taxpayer as a consequence of statutory violations or legal expenses incurred in an unsuccessful defense of a criminal prosecution, are not deductible even though proximately connected with the taxpayer's business. *Burroughs Bldg. Material Co.* v. *Commissioner*, 47 F. (2d) 178 (C. C. A. 2d) (violation of state price-fixing laws); *Great Northern Ry. Co.* v. *Commissioner*, 40 F. (2d) 372 (C. C. A. 8th), certiorari denied, 282 U. S. 855 (violation of federal statute and regulations in operation of railroad); *Chicago, R. I. & P. Ry. Co.* v. *Commissioner*, 47 F. (2d) 990 (C. C. A. 7th), certiorari denied, 284 U. S. 618 (violation of Safety Appliance Act); *Tunnel R. R.* v. *Commissioner*, 61 F. (2d) 166, 173–174 (C. C. A. 8th), certiorari denied, 288 U. S. 604 (violations of Safety Appliance Act and the Twenty-Eight Hour Live Stock Act); *Gould Paper Co.* v. *Commissioner*, 72 F. (2d) 698, 702 (C. C. A. 2d) (fees in

antitrust proceedings). Cf. *National Outdoor Advertising Bureau* v. *Helvering*, 89 F. (2d) 878 (C. C. A. 2d); *United States* v. *Jaffray*, 97 F. (2d) 488 (C. C. A. 8th), affirmed on other issues *sub nom. United States* v. *Berteisen & Petersen Engineering Co.*, 306 U. S. 276. See also *Bonnie Bros., Inc.* v. *Commissioner*, 15 B. T. A. 1231; *Levenstein* v. *Commissioner*, 19 B. T. A. 99; *Columbus Bread Co.* v. *Commissioner*, 4 B. T. A. 1126; *Achelis* v. *Commissioner*, 28 B. T. A. 244; *Sanitary Earthenware Specialty Co.* v. *Commissioner*, 19 B. T. A. 641; *Atlantic Terra Cotta Co.* v. *Commissioner*, 13 B. T. A. 1289; *Wolf Manufacturing Co.* v. *Commissioner*, 10 B. T. A. 1161; *Estate of Thompson* v. *Commissioner*, 21 B. T. A. 568, appeal dismissed, 62 F. (2d) 1082 (C. C. A. 8th); *Lindheim* v. *Commissioner*, 2 B. T. A. 229.[7] Similarly, considerations of public policy have no doubt been dominant in denying deductions on account of bribes paid by bootleggers, or expenses incurred in an illegal gambling enterprise, or payments made in response to commercial extortion (such as payments to racketeers). See *Maddas* v. *Commissioner*, 40 B. T. A. 572, affirmed, 114 F.

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[7] The English courts have reached similar results in applying the cognate provisions of the British Income Tax Acts. See *Inland Revenue Commissioners* v. *Von Glehn*, [1920] 2 K. B. 553; *Inland Revenue Commissioners* v. *Warnes & Co.*, [1919] 2 K. B. 444; *Ward & Co.* v. *Commissioners*, [1923] A. C. 145.

(2d) 548 (C. C. A. 3d); *Silberman* v. *Commissioner*, 44 B. T. A. 600; *Kelley-Dempsey & Co.* v. *Commissioner*, 31 B. T. A. 351. Cf. *United States* v. *Sullivan*, 274 U. S. 259, 264. And deductions for "commissions" paid to persons for their use of personal influence in obtaining public contracts have likewise been denied. *Easton Tractor & Equipment Co.* v. *Commissioner*, 35 B. T. A. 189; *New Orleans Tractor Co.* v. *Commissioner*, 35 B. T. A. 218; *Nicholson* v. *Commissioner*, 38 B. T. A. 190.[8]

The foregoing decisions are founded in large part upon public policy; they rest upon the assumption, whether implicit or explicit, that since Congress could not have intended to allow such deductions it did not intend the phrase "ordinary and necessary expenses" to embrace such expenditures. The Treasury Department has officially adopted that interpretation for over twenty-five years with respect to lobbying expenses, and the regulations embodying that interpretation have been judicially sustained. See p. 15, *supra*. They apply with particular force here since the lobbying contracts themselves were of doubtful legality and since the expenses related to the preparation and dissemination of propaganda, part of which at least was undoubtedly intended to appear as though emanating from unbiased sources.

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[8] A somewhat contrary result was reached, erroneously, we believe, in *Alexandria Gravel Co.* v. *Commissioner*, 95 F. (2d) 615 (C. C. A. 5th). See comment of Judge Clark (R. 61).

II

WHETHER THE COURT BELOW WAS PROPERLY CONSTITUTED

Introductory.—Section 117 of the Judicial Code (U. S. C., Title 28, Sec. 212) provides that "There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum * * *." By an amendment to Section 118 of the Code, adopted in 1912, however, it is provided that "The circuit judges in each circuit shall be the judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law * * *." Act of January 13, 1912, 37 Stat. 52 (U. S. C., Title 28, Sec. 213). At the time that amendment was adopted the statute provided for four circuit judges in the Second, Seventh, and Eighth Circuits (37 Stat. 52), and at present there are more than three circuit judges in each circuit except the First and Fourth.[9] Although Section 117 was not amended, the court below held that

[9] The statutes now provide for seven circuit judges in the Eighth and Ninth Circuits, six in the Second and Sixth Circuits; five in the Third, Fifth, and Seventh Circuits; and four in the Tenth Circuit. (See the various acts whose substance is incorporated in U. S. C., Title 28, Secs. 213, 213a–213h, inclusive.)

the 1912 amendment to Section 118 must be taken to have modified Section 117 by implication; and since there are now five circuit judges in the Third Circuit, the court held that it had authority, under these provisions, to sit as a five-judge court.

We have attempted to explore fully the question raised by the decision below and are in some doubt as to the correct answer. The legislative history of the statutory provisions relied upon by the court does not, we think, support its conclusion; on the other hand, there is nothing in the legislative history which is directly contrary to the decision. The statutory provisions on their face are susceptible of the construction given them by the court, but they are equally susceptible of the other interpretation, and the conflicting inferences that may be drawn from them furnish very little aid in the solution of the problem. However, there are strong considerations of public policy supporting the result reached and, since the interpretation is a permissible one, this Court would be justified in approving the action of the court below.

In order to assist the Court in its consideration of this question, we shall set forth fully the results of our investigation. We shall discuss (1) the general background of the problem, (2) the legislative history of the provisions involved, (3) the inferences to be drawn from the face of the statute, and (4) the extrinsic considerations of public policy.

A. BACKGROUND OF THE PROBLEM

The circuit courts of appeals have ordinarily sat as courts of three judges, irrespective of the number of circuit judges in the circuit. Although it has been stated that at times in the past more than three have sat,[10] only recently does it appear that attention has been focussed on the question whether the courts could properly be composed of more than that number. At least since the adoption of the Judicial Code in 1911, questions relating to the composition of those courts have generally dealt with the increase in the number of circuit judges to enable the courts more effectively to handle the volume of work before them.

In 1924, the question was expressly raised by members of the House Judiciary Committee in the course of testimony by Chief Justice Taft and Assistant Attorney General Holland in support of a bill to increase the number of circuit judges in the Eighth Circuit from four to six. H. Rep. No. 102, 68th Cong., 1st Sess., accompanying H. R. 661. But the responses were not unequivocal,[11] and what

[10] Editorial, *Federal Circuit Courts of Appeals—Their Impracticable Organization*, 69 Central L. J. 217 (1909).

[11] Chief Justice Taft's testimony was as follows (p. 4):

"The CHAIRMAN. Is there not a requirement in the law * * * as to the number of judges constituting the circuit court of appeals?

"Chief Justice TAFT. Yes; there must be two judges, but they sit three in a court.

"The CHAIRMAN. Three constitute the court.

"Chief Justice TAFT. Yes; there may not be more than four to constitute the court of appeals, but two can. It is very

the final conclusion drawn by the committee may have been does not appear.

The question appears to have been raised also at the meeting of the Judicial Conference of Senior

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bad practice, however, to sit with only two; it detracts from the weight of the court's opinions.

* * * * * * *

"The CHAIRMAN. It was stated here the other day * * * that the law required or limited the number to sit at three, and that being the case in the District of Columbia here, where they wanted to add some others, that it would require the law to expressly enlarge the number that might sit.

"Chief Justice TAFT. I looked into that, Mr. Chairman, when the question came up with reference to the use of the judges of the Court of Customs Appeals * * * and an examination of the law made me feel that special congressional authority would be required to increase the number of that court."

Then when Representative Montague raised the point with Assistant Attorney General Holland, he testified as follows (p. 6):

"Mr. MONTAGUE. The circuit court of appeals consists of three members?

"Mr. HOLLAND. Yes.

"Mr. MONTAGUE. More than three cannot sit in a court.

"Mr. HOLLAND. I so understand."

Two years previously, Chief Justice Taft, when asked for his opinion as to the desirability of increasing the number of circuit judges in the Fourth Circuit from two to three, had testified as follows (Hearings before the House Committee on the Judiciary on H. R. 10479, 67th Cong., 2d Sess., Serial 33, Part 1, p. 9):

"Mr. MONTAGUE. You would have the circuit courts of appeals composed entirely of circuit judges?

"Mr. Chief Justice TAFT. I think that one of the defects that have arisen in the administration of the circuit courts of appeals has been the change of the personnel of the courts. It has varied the uniformity of the decisions. There is a

Circuit Judges in October 1936. The report states that, upon the proposal of Circuit Judge Wilbur, a committee was appointed "to consider the advisability of amending Section 212 of Title 28 of the United States Code [Section 117 of the Judicial Code] in relation to the constitution of the circuit courts of appeals, with particular reference to those circuits in which there are now more than three judges * * *." Report of the Judicial Conference, October Session, 1936, p. 5. In 1938, the Conference recommended an amendment to the Code so that when there were more than three judges in a circuit "the majority of the circuit judges may be able to provide for a court of more than three judges when in their opinion unusual circumstances would make such action advisable." Annual Report of the Attorney General, 1938, p. 23. The recommendation was renewed by the Conference in 1939 and again in 1940. Annual

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good deal of human nature in judges, and it helps to have the same court sitting together. If you have four circuit judges who sit together, that defect is reduced a good deal, because they are always together; but where you call in district judges that condition is disturbed, and it is not as wise a method of providing for the court as where you have a solid court constantly sitting. As I say, I was very glad to see that in the Senate bill they added to what you have done in the additional judge bill by putting another circuit judge in the fourth circuit."

But whether, in view of the fact that the circuit courts of appeals were customarily composed of three judges, he had in mind that all four judges should sit on individual cases at the same time seems doubtful.

Report of the Attorney General, 1939, p. 15; *Id.*, 1940, p. 24.

Thereafter, in response to the recommendations of the Conference, a bill was introduced during the present session of Congress in both the House (H. R. 3390) and the Senate (S. 1053) to amend Section 117 of the Judicial Code so as to read:

> SEC. 117. There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established: *Provided, That, in a circuit where there are more than three circuit judges, the majority of the circuit judges may provide for a court of all the active and available circuit judges of the circuit to sit in banc for the hearing of particular cases, when in their opinion such action is advisable.* (The new matter proposed to be added is shown in italics.)

A subcommittee of the Senate Judiciary Committee has held hearings on the bill, but no definitive action has yet been taken in the Senate. In the House of Representatives, the Committee on the Judiciary reported the bill favorably (H. Rep. No. 1246, 77th Cong., 1st Sess), and it was passed by the House on October 21, 1941. 87 Cong. Rec. 8328 (Pamph.).[12]

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[12] The report states:

"The Committee on the Judiciary, to whom was referred the bill (H. R. 3390) to amend section 117 of the Judicial

Meanwhile, in 1938, the problem was brought to the forefront in actual litigation.[13] In *Lang's Estate v. Commissioner*, 97 F. (2d) 867 (C. C. A. 9th), the Commissioner had relied upon an earlier decision in that circuit which had been rendered by Circuit Judges Garrecht and Haney, with Circuit Judge Wilbur dissenting. The court in the *Lang* case was composed of Circuit Judges Den-

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Code, as amended, with respect to the constitution of circuit courts of appeals, having considered the same, report the bill favorably to the House and recommend that it do pass.

"Under existing law provision is made that there shall be in each circuit a circuit court of appeals which shall consist of three judges, of whom two shall constitute a quorum. The bill adds a provision that in a circuit where there are more than three circuit judges, the majority of the circuit judges may provide for a court of all the active and available circuit judges of the circuit to sit in banc for the hearing of particular cases, when in their opinion such action is advisable.

"If the court can sit in banc the situtaion where two three-judge courts may reach conflicting conclusions is obviated. It also will obviate the situation where there are seven members of the court and as sometimes happens a decision of two judges (there having been a dissent) sets the precedent for the remaining judges. A similar result would be avoided with a court of five judges.

"It seems desirable that where the judges feel it advisable they might sit in banc for hearing particular cases. Legislation to this effect has been recommended by the judicial conference of senior circuit judges since 1938, and at its January 1941 session the conference approved the form of the present bill."

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[13] That same year, there was some discussion, touching upon the question, in the course of testimony by Senator Overton before a Subcommittee of the Senate Judiciary Committee on a proposal which, among other things, would increase the

man, Matthews, and Healy who disagreed with the decision in the earlier case. These judges wished neither to be controlled by the precedent established by two of the seven judges in the circuit, nor to overrule the earlier decision. But they also were of the opinion that no more than three judges might sit in the Circuit Court of Appeals, and that therefore there was no method of hearing or rehearing by a larger number. They resolved the problem by certifying the questions involved to this Court, where they were determined. *Lang* v. *Commissioner*, 304 U. S. 264.[14]

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number of circuit judges in the Fifth Circuit from four to five. The impression appears to have prevailed that the circuit courts of appeals sat as three-judge courts only as a matter of practice. Senator Norris questioned "why it is not justly so, the subject of complaint that not all of the judges participate in a particular case." Senate Hearings, 75th Cong., 3d Sess., Subcommittee of the Committee on the Judiciary on S. 3233, Part 2, pp. 81–82. But the inquiry was not pressed.

[14] The certificate stated: "Not being satisfied with this previous decision by two of the seven Circuit Judges eligible to sit in a court in which two constitute a quorum, and three usually sit, we deem the questions here, in view of their importance, are proper ones to certify." Record in this Court, No. 919, 1937 Term, p. 5.

A situation similar to that which confronted the judges of the Ninth Circuit in the *Lang* case was presented shortly thereafter in the Fifth Circuit in *Bartels* v. *John Hancock Mut. Life Ins. Co.*, 100 F. (2d) 813. The result there, however, was a conflict within the same circuit upon the basis of which this Court granted certiorari. *John Hancock Ins. Co.* v. *Bartels*, 308 U. S. 180, 181. The possibility of the judges sitting *en banc* was not mentioned.

In 1940, the Circuit Court of Appeals for the Third Circuit, in patent disagreement with the views of the Circuit Court of Appeals for the Ninth Circuit in the *Lang* case, adopted new rules which provided for the consideration of cases, by special order, by a court composed of all the judges in active service sitting *en banc*. Rules 4 and 5 (2).[15] See Appendix, *infra*, pp. 59, 60. Implicit in the adoption of these rules was the view that specific statutory amendment was not necessary. The opinion in the instant case, in which all five circuit judges concurred, sets forth both the basis for this conclusion and the administrative considerations which made adoption of the new rules desirable.[16]

B. THE LEGISLATIVE HISTORY

The circuit courts of appeals were established by the Act of March 3, 1891, 26 Stat. 826, which provided that there should be a circuit court of appeals in each circuit "which shall consist of three

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[15] The rules were adopted February 14, 1940, and became effective March 1, 1940.

[16] The court reaffirmed its position in a number of other cases, at least three of which are now before this Court. *Oughton* v. *National Labor Relations Board*, 118 F. (2d) 486, pending on petition for certiorari No. 98, present Term; *National Labor Relations Board* v. *Newark Morning L. Co.*, 120 F (2d) 262, pending on petition for certiorari, No. 307, present Term; *Southern S. S. Co.* v. *National Labor Relations Board*, 120 F. (2d) 505, certiorari granted, Oct. 13, 1941, No. 320, present Term.

judges." Section 2. Immediately prior to that statute the basic Federal judicial system consisted of the Supreme Court, the circuit courts, and the district courts. By creating the circuit courts of appeals in 1891, Congress brought into being a fourth set of courts, but it did not provide them with any judges of their own. Instead, it was intended that they should be held by three judges drawn from the three existing groups of judges who by Section 3 were made "competent to sit as judges of the circuit court of appeals within their respective circuits". Thus, it seems clear that under the 1891 Act it was not contemplated that a circuit court of appeals would be held by more than three judges.

In 1911, Congress enacted the Judicial Code, in which the circuit courts were abolished. 36 Stat. 1087. However, the provisions in Section 2 of the 1891 Act, providing for a circuit court of appeals in each circuit "which shall consist of three judges," were reenacted without substantial change as Section 117 of the Code. And according to the Report of the Special Joint Committee on Revision and Codification of the Laws, the section merely represented existing law.[17] Section 118 provided for four circuit judges in the Second, Seventh, and Eighth Circuits, two in the

[17] S. Rep. No. 388, 61st Cong., 2d Sess., Pt. I, p. 49. In the original bill this section was numbered 115.

Fourth Circuit, and three in the others. This section was intended simply to state "in concise language the number of judges now provided by law for the several judicial circuits."[18] When it is also considered that this section immediately followed Section 117, it would seem that Congress must have regarded the two sections as consistent. In other words, it probably was the congressional understanding that irrespective of the number of circuit judges available for duty on the court, the court would continue to consist of three.

But apparently due to oversight, the Code did not include any provision expressly authorizing or directing the circuit judges to sit as judges of the circuit courts of appeals. Section 120 of the Code (U. S. C., Title 28, Sec. 216), in reenacting Section 3 of the 1891 Act, while retaining the provision that the Chief Justice, the circuit justices, and the district judges within each circuit, were "competent" to sit as judges of the circuit courts of appeals, omitted the circuit judges from this group.[19] It may possibly have been thought that

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[18] Report, p. 50, *supra* note 17. The bill as originally proposed, had provided for a third circuit judge in the Fourth Circuit, but the recommendation was not adopted. Section 118 was numbered 116 in the original bill.

[19] That the omission was accidental is supported by the fact that it was not noted in the report of the Joint Committee, although the report was meticulous in its description of other changes in the section. The comment on Section 118 of the bill, which became Section 120 of the Code, was as follows: "This section is but a reenactment, with slight change of language, of section 3 of the circuit court

the circuit judges became *ex officio* judges of the respective circuit courts of appeals upon the abolition of the circuit courts and that it was therefore unnecessary to describe them as "competent" to sit on their own courts. Cf. R. 54–55. At any rate, the absence of any specific provisions caused sufficient concern to occasion the adoption of the 1912 amendment, which we have described, *supra*, p. 24.[20]

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of appeals act, the changes consisting in the dropping of the word 'that' at the beginning of the section, in the substitution of the word 'shall' for 'should,' and in the omission of the words 'justice or' in the proviso, since it is not contemplated that the justices of the Supreme Court shall sit in the district courts." Report, p. 50, *supra* note 17.

[20] It appears from a letter written to the Editor of the Central Law Journal (74 Central L. J. 12) by Albert H. Walker, a New York attorney, that he had discovered the omission from Section 120 and had brought it to the attention of Senator Dillingham of the Senate Judiciary Committee. The letter states that Senator Dillingham's reply "was to the effect that the error had not been noticed by any member of that Committee prior to my letter calling attention thereto." Senator Dillingham suggested, however, "that if the error were to be corrected by inserting in the Judiciai Code the same words that operate in Section 3 of the Judiciary Act of 1891 to make the circuit judges 'competent' to sit as judges of the Circuit Court of Appeals within their respective circuits; the Judicial Code would still stop short of making it the duty of the circuit judges to hold such Circuit Courts of Appeals." Walker thereupon drafted a proposed amendment, which he sent to Senator Dillingham for the consideration of the Judiciary Committee, and it is stated that it was the amendment, as thus drafted, which was introduced in the Senate by Senator Sutherland, and subsequently became law.

The amendment, as we have stated, provided that "the circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit" and imposed upon each of them the duty "to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law." In these circumstances, it seems dubious that Congress could have intended these provisions to modify by implication the unchanged provisions in Section 117 of the Code.

2. Ordinarily a court will consist of the judges appointed to it. The statute establishing this Court,[21] as well as the statutes creating intermediate federal courts other than the circuit courts of appeals, appear to be drafted in such a manner as to permit of no other interpretation.[22] An amendment to a statute of this type providing for an additional judge would seem by necessary im-

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[21] "The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight Associate Justices, any six of whom shall constitute a quorum." Judicial Code, Sec. 215 (U. S. C., Title 28, Sec. 321).

[22] For example, Section 136 of the Judicial Code of 1911 provided that "The Court of Claims, established by the Act of February twenty-fourth, eighteen hundred and fifty-five, shall be continued. It shall consist of a chief justice and four judges * * *." (36 Stat. 1135; U. S. C., Title 28, Sec. 241). Section 188 of the Code provided that "There shall be a United States Court of Customs Appeals, which shall consist of a presiding judge and four associate judges * * *." (36 Stat. 1143; U. S. C., Title 28, Sec. 301).

plication to increase the size of the court.[23] The situation would be the same as if Section 117 of the Code had provided that the Circuit Court of Appeals should consist of the circuit judges within the circuit; if that were the case, it would seem that the circuit court of appeals in each circuit would consist of all the circuit judges in that circuit.

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[23] In 1924, the question was raised (as indicated by the testimony of Chief Justice Taft quoted in footnote 11, *supra*), whether the District of Columbia Court of Appeals could sit as a court of more than three judges, composed of the three justices of that court plus additional judges of the Court of Customs Appeals, who could be assigned to service with that court. At that time the Act provided for a "court of appeals of the District of Columbia, which shall consist of one chief justice and two associate justices * * *." Act of February 9, 1893, 27 Stat. 434, Sec. 1. Specific legislation was deemed necessary to permit the court to sit as a court of more than three judges (H. Rep. No. 58 on H. R. 4507, 68th Cong., 1st Sess. (1924)), but was not adopted at that time.

Thereafter, the Act of June 19, 1930, 46 Stat. 785, authorized the appointment of two additional justices to the Court of Appeals for the District of Columbia, and that court then sat as a five-judge court for about seven or eight years. Occasionally during that period it sat with less than five judges, and the question has been raised whether it could sit with less than its full complement. See record in *United States ex rel. Societe, etc.*, v. *Coe*, No. 298, October Term, 1937, pp. 84-85; *Davis* v. *Davis*, 305 U. S. 32 (Record, p. 72, No. 16, 1938 Term).

More recently, when it was proposed temporarily to increase the number of justices of that court to six, a proviso was included "that not more than five justices of such court shall sit at any one time, to be designated by the Chief Justice." The purpose was "to assure that three justices will

But we are aware of no compelling reason why a statute cannot provide that a court, when sitting, should consist of a number of judges less than the total number appointed to it. While a court and its judges are often regarded as synonymous, conceptually they are separate entities. The classic statement is Mr. Justice Story's sitting as circuit justice, in *United States* v. *Clark*, 1 Gallison 497, and repeated by Mr. Justice Brewer in *Todd* v. *United States*, 158 U. S. 278, 284:

> A court is not a judge, nor a judge a court. A judge is a public officer, who, by virtue of his office, is clothed with judicial authorities. A court is defined to be a place in which justice is judicially administered. It is the exercise of judicial power, by the proper officer or officers, at a time and place appointed by law.[24]

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constitute a majority of the court." H. Rep. No. 1057, 72d Cong., 1st Sess., on H. R. 11336. When, however, the number of justices of that court was increased to six (Act of May 31, 1938, 52 Stat. 584, Sec. 2), no comparable provision was included. Since 1938, it has usually sat as a three-judge court, although there has been some departure from that practice. In *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, pending before this court on certificate, No. 508, this term, the case was originally heard by a three-judge court which decided the case 2–1 (certificate, pp. 4–49); it was thereafter set for rehearing before all six judges, and the certificate followed since they were equally divided (certificate, p. 2).

[24] This concept has found expression in numerous state court decisions. E. g., *Hartshorn* v. *Illinois Valley Ry. Co.*, 216 Ill. 392, 404; *Salinger* v. *Telegraph Co.*, 147 Ia. 484, 492; *State ex rel. Mayer* v. *Cincinnati*, 60 Ohio App. 119; *Carter's Estate*, 254 Pa. 518, 527.

This distinction would dispel the apparent inconsistency between Section 117 and the amendment to Section 118. The statute could be construed as continuing to provide for a court of three judges, drawn from a panel of such larger number whose appointment might otherwise be authorized.[25]

3. Considered against their background, the statements in debate made by Senator Sutherland, who was in charge of the bill in the Senate, and the comment in the report of the House Committee on the Judiciary, referred to in the opinion of the court below (R. 55) are, at best, equivocal.[26] As suggested by subsequent remarks of Senator Sutherland,[27] the statements that the cir-

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[25] Compare Article 6 of the New York Constitution which provides that the appellate divisions of the supreme court in each of the first and second departments shall consist of seven justices, and provides further (Section 2) that "No more than five justices shall sit in any case."

[26] Senator Sutherland stated: "It makes no change whatever in the existing law except to make it clear that the circuit judges in the various circuits of the United States shall constitute the circuit court of appeals" Cong. Record, Vol. 47, Part 3, p. 2736.

The comment of the House Committee was, as follows: "This bill deals with a defect in existing law. It makes it clear that the circuit judges shall constitute the circuit court of appeals." H. Rep. No. 199 on S. 2653, 62d Cong., 2d Sess., December 20, 1911.

[27] "It has been thought, as I said, that the existing law did not make it quite clear that the circuit judges shall be the constituent members of the circuit court of appeals, and it is to remove that doubt, and that only, that this bill has been reported from the Judiciary Committee." Cong. Record, Vol. 47, Part 3, p. 2736.

cuit judges "shall constitute" the circuit courts of appeals, may have been merely an elliptical way of saying that these judges shall be members of that court. That, in fact, was as much as the amendment itself specifically provided. The statements, moreover, placed their principal emphasis upon the fact that the amendment would merely cure an existing defect, and otherwise made no change in existing law. We believe, therefore, that they were not inconsistent with an understanding that under Section 117 of the Code, the court, when sitting, would continue to consist of no more than three judges.

Similarly, statements made in the debate upon the amendment in the House of Representatives do not reflect an intent to affect the existing structure and organization of the courts. Representative Clayton, the chairman of the House Judiciary Committee, who was in charge of the bill, stated its purpose as (Cong. Record, Vol. 48, Part 1, p. 667)—

> specifically conferring upon the circuit judges the power and imposing upon them the duty of holding the circuit court of appeals. * * * While the provisions of sections 117, 118, 119, and 120 are in themselves probably sufficient to confer the power and impose the duty, yet, since there is a difference of opinion in the matter, it has been thought best to amend section 118 as the bill provides. It will settle any doubt

which may exist in the minds of those who believe the amendment necessary.

Representative Moon, chairman of the House Committee on the Revision of the Laws and a member of the Special Joint Committee, who had been in charge of the bill providing for the Judicial Code before the House, did not regard the amendment as necessary, but supported it as simply making "assurance doubly sure," since "it is highly important that no doubt should exist in the mind of anyone as to the competency of the judges to hold this court." Cong. Record, Vol. 48, Part 1, p. 668.[28]

More particularly, Representative Clayton, in explaining the omission in the statute which created the problem, stated (Cong. Record, Vol. 48, Part 1, p. 667) that after the omission of the reference to the circuit judges in Section 120, "by

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[28] In describing the situation under existing law, Representative Moon said: "The circuit court of appeals, as created by the act of March 3, 1891, is composed primarily of circuit judges. By special provisions of the act the supreme justice of the circuit is made a component part of that court, and one of the district judges may be designated to sit therein when occasion shall require it. The new act does not change these provisions. It reenacts them. It does not specifically assign the circuit judge to that court. It treats that court as composed primarily of those judges. It makes special provision for the designation of the district judge as occasion requires, and makes also provision for the precedence of the judges when the circuit justice shall attend. It treats the circuit judge as the judge upon whom the entire work of the circuit court of appeals devolves, except under the special conditions before enumerated." Cong. Record, Vol. 48, Part 1, p. 668.

some oversight the word 'circuit' before the word 'judges' was left out of section 117. Hence, it is necessary, or it is deemed by some to be necessary, to have this amendment, which, in effect, reinserts that word in section 118." However, it may be doubted that the question could have been solved merely by inserting the word "circuit" in Section 117, for this without more would have impliedly excluded from the courts the circuit justices and district judges whom Section 120 made competent to sit. But this matter of draftsmanship aside, it seems that if the amendment to Section 118 was intended to have the same effect as if Section 117 provided that the circuit courts of appeals should "consist of three circuit judges," it cannot be inferred that the amendment was intended to modify Section 117 to provide for more than three judges.

5. Finally, in the consideration of the proviso added to the 1912 amendment which made it clear that the circuit judges could still sit in the district courts,[29] Representative Mann, chairman of the Conference minority, who proposed the measure, referred to the fact that (Cong. Record, Vol. 48, Part 1, p. 667)—

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[29] "*Provided*, That nothing in this section shall be construed to prevent any circuit judge holding district court or serving in the commerce court, or otherwise, as provided for and authorized in other sections of this Act." Act of January 13, 1912, 37 Stat. 52, 53. The reference to the Commerce Court was deleted in the Act of February 25, 1919, 40 Stat. 1156.

> When the act amending the judiciary title was before the House we inserted a provision to the effect that the circuit judges might be assigned to the district court work, so that in these circuits where there were four circuit judges, one of them might be put at work in the district court.

The understanding thus implied in Representative Mann's comments, that where there were four circuit judges, the fourth judge would not sit with the others, was emphasized later in the same session, in connection with a proposal to reduce the number of circuit judges in the Seventh Circuit from four to three and to create instead an additional district judgeship. H. R. 17595, 62d Cong., 2d Sess. The report of the House Judiciary Committee, recommending adoption of the bill, stated that "Since January 1, 1912, all circuit judges became judges of the circuit court of appeals, which court consists of three judges." H. Rep. No. 240, 62d Cong., 2d sess., appearing at Cong. Record, Vol. 48, Part 2, p. 1271. Representative Evans of Illinois, in supporting the bill, observed, after referring to the fact that the circuit court of appeals is composed of three judges, that "yet we have four judges who compose that court. One of them will be idle most of the time." Cong. Record, Vol. 48, Part 2, p. 1272. And Representative Mann elaborated the thoughts that he had advanced in the consideration of the 1912 amendment, namely, that "It is to be presumed

that ordinarily where there were four circuit judges the junior circuit judge would be assigned to sit in the district court." *Ibid.* Of course, the foregoing statements are not necessarily incompatible with the conclusion that although the court ordinarily would be composed of three judges for the purpose of hearing cases, it could sit *en banc* if it so desired.

C. INFERENCES TO BE DRAWN FROM THE FACT OF THE STATUTE

Apart from the question whether the 1912 amendment to Section 118, in making all the circuit judges members of the circuit courts of appeals, was inherently inconsistent with Section 117, the various sections of the statute provide conflicting inferences as to the correct construction to be given these two sections.

1. The latter part of the 1912 amendment, making it the duty of the circuit judges to sit upon the circuit courts of appeals "from time to time according to law" may, as concluded by the court below (R. 56), merely refer to Section 126 of the Code (U. S. C., Title 28, Sec. 223), which regulates the times when the circuit courts of appeals shall sit. This appears to be a reasonable conclusion. On the other hand, it is possible to construe the phrase "according to law" to refer to Section 117 as well. If this construction were adopted, the provision would impose upon each judge the duty to sit upon the court from time to time in order to provide

the three judges which constitute the court under that section.

2. The fact that all functions pertaining to the administration of the courts are placed in the hands of the "court," is persuasive evidence that it is composed of all the judges. It is the "circuit court of appeals" which is directed to "prescribe the form and style of its seal and the form of writs and other process and procedure." Section 122 (U. S. C., Title 28, Sec. 219). "Each court" appoints a clerk, and the appointment and removal of deputy clerks, is subject to the approval of the "court." Section 125 (U. S. C., Title 28, Sec. 222). The courts are held "at such times as may be fixed by said courts." Section 126 (U. S. C., Title 28, Sec. 223). The court below pointed out that its practice was for all the circuit judges to join in the performance of such duties (R. 57). Since all the judges must perforce be interested in these matters, it would be anomalous if they did not.

Yet this point is not necessarily conclusive. The same language, even within the same statute, can have different meanings where that is required by the context and the purpose of the Act. *Am. Security Co.* v. *Dist. of Columbia*, 224 U. S. 491. Although the "court," upon which appellate jurisdiction is conferred by Section 117, may be limited to three judges, the "court," as that term is used in these other sections, may mean all the judges,

even though the statute does not contain specific authority for that construction.

If all the judges may properly participate in the adoption of the "rules and regulations for the conduct of the business of the court" under Section 122, there would seem to be no reason to fear the difficulties, such as those suggested by the court below (R. 57) incident to the selection of the judges who are to sit at particular sessions of the court. In the absence of any other provision as to the manner in which the selection is to be made, it may be assumed that if it is not done through informal arrangement appropriate rules might be adopted under this section.

3. Other provisions of the statute do not shed much light upon the question whether the "court" may consist of more than three judges. Thus, Section 3 of the 1891 Act, *supra,* as incorporated in Section 120 of the Code, provides that "In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court * * *." As indicated by the court below, under the 1891 Act, it was evident that the reference in this section to a "full court" was to a court of three judges (R. 53). The only change in this section made in the Code was to change the language from "one or more district judges within

the circuit shall be competent to sit" to "one or more district judges * * * shall sit."[30] If the "court" is composed of all the circuit judges in active service, this section would imply that district judges could be called in whenever the court was composed of less than that number. Thus, pursuant to that interpretation, the court below could be composed, for example, of four circuit judges and a district judge. However, the court apparently does not regard its conclusion as requiring that result for its Rule 4 (Appendix, *infra*, p. 59) makes no provision for calling in district judges when it sits *en banc*.

Further complications arise if a circuit justice should sit. Under the court's Rule 4, it would seem that the circuit justice would become a sixth member of the court, rather than replace one of the five circuit judges.[31] But if that interpreta-

[30] See comments in the report of the Special Joint Committee, note 17, *supra*.

[31] Compare the situation which arose in the Court of Appeals for the District of Columbia, described in footnote 23, *supra*. Entirely moot, at the present time, would be the question of the status of the circuit judges, originally appointed to the Commerce Court, and thereafter assigned to service in a circuit court of appeals. Judicial Code, Sec. 200, 205 (see 38 Stat. 219). On the other hand, there is the question as to whether a circuit judge, who had retired from active service under Sec. 260, Judicial Code, as amended by the Act of February 25, 1919, 40 Stat. 1156, Sec. 6 (U. S. C., Title 28, Sec. 375), would be a member of the "court," if he accepted a call to perform judicial duties in that circuit. Rule 4 of the court below answers that question in the negative.

tion were to be carried to its ultimate conclusion, the "full" court referred to in Section 120 would consist of six judges, rather than five; and, under Section 120, if the Supreme Court justice did not sit, then a district court judge could be brought in to make up the full court of six. The rules of the court below do not provide for such procedure, but it would seem to be the consequence of its interpretation of the statute. The result would be novel but would not necessarily mean that the decision below is erroneous.

D. CONSIDERATIONS SUPPORTING RESULT OF COURT BELOW

Against these difficulties of technical statutory construction, based on the evidence in the legislative history and the inferences to be drawn from the face of the statute, is the fact that the opinion of the court below supports a procedure which is both inherently sound from the standpoint of wise and effective judicial administration and is consonant with the purposes underlying the present organization of the federal judicial system. The inferences are conflicting, and, in large part, the evidence in the legislative history is negative in character. The precise question now before the Court was not in issue before the Congress, and in none of the statements to which we have referred was the belief affirmatively expressed that the 1912 amendment to Section 118 of the Judicial Code did not have the effect attributed to it by the court below. Accordingly, we believe that part-

ticular weight should be attached to these fundamental considerations in the resolution of the question.

As the court below pointed out, common sense and sound practice dictate that all the judges of the court should be in a position to decide the principles of law and practice to which the court is committed. This makes for finality of decision and for the authority and prestige of the tribunal. Differences of decision deriving from the chance composition of the three-judge court will be avoided. Situations, such as those which developed in *John Hancock Ins. Co.* v. *Bartels,* 308 U. S. 180, and *Lang's Estate* v. *Commissioner,* 97 F. (2d) 867, will be resolved within the circuit.[32]

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[32] The problem was thus posed in an editorial written in 1909 (*Federal Circuit Courts of Appeals—Their Impracticable Organization*, 69 Central L. J. 217, 219):

"It may be said in conclusion, that there is an essential difference between different benches of different appellate courts disagreeing with each other, and where divisions of a court differ. The court *in banc* may compose the latter differences. Where intermediate appellate courts differ, they certify this fact to the supreme court to settle.

"The prime trouble is, that each casual bench in a Circuit Court of Appeals is the court *in banc* and several of them may go on differing forever so far as any power in the court exists to prevent it. And different cases may be, and seem to have been, conclusively decided on conflicting principles in the same court."

Cf. also *McCormick's Contested Election*, 281 Pa. 281. For a general discussion of the practical aspects of the problem, see also Pound, *Organization of Courts* (1940) pp. 199–225.

These considerations acquire added significance if viewed against the background of the federal judicial system. The circuit courts of appeals are not merely intermediate appellate tribunals, but are intended to be courts of last resort in all ordinary instances. The Supreme Court's functions essentially are to "resolve conflicts among the coordinate appellate tribunals and to determine matters of national concern."[33] The procedure adopted in the Third Circuit strengthens this structure, by promoting finality of decision in the circuit courts of appeals and avoiding the necessity of further review merely to resolve conflicts among the judges within a circuit. If the procedure is not available, to that extent the structure is weakened.[34]

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[33] Frankfurter & Landis, *The Business of the Supreme Court* (1927), 255-257, 260-261, 262:

"The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal." Chief Justice Taft in Hearings before the Committee on the Judiciary, House of Representatives, 67th Cong., 2d Sess., on H. R. 10479, March 30, 1922, at 2, quoted in Frankfurter & Landis, *supra*, 257, n. 10.

[34] Factors such as these were stressed by Mr. Justice Van Devanter, when testifying in 1928 before the House Committee on the Judiciary on the proposal to create a Tenth Circuit. He described the situation then existing in the Eighth Circuit where the court, in order to keep abreast of its work, was in practice sitting in three divisions, and stated (Hearings before the House Committee on the Judiciary on H. R.

This Court has stressed the importance to be given to such considerations in construing a statute of this character in *Am. Security Co.* v. *Dist. of Columbia, supra.* In the last analysis, we think that the conclusion here should turn upon these considerations as opposed to the competing factors which we have discussed above.

CONCLUSION

The deductions on account of the lobbying expenses were correctly disallowed. The decision of the court with respect to its power to sit *en banc* is in accord with a permissible interpretation of the statute and is supported by strong considerations of policy although the legislative

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5690, 13567, and 13757, 70th Cong., 2d Sess., Serial 23, Part 2, p. 72): "It is impossible for each of those courts acting separately—although the same court—to have present knowledge of what the others are doing; and it unavoidably detracts from the continuity and harmony of their lines of decision. * * * The division detracts from the prestige of the court—and this notwithstanding the greatest diligence on the part of the individual judges."

And when asked subsequently whether the situation did not increase the work of the Supreme Court, he replied as follows (p. 73): "Yes; in two ways: In some cases it becomes apparent that there has not been that continuity and harmony of decisions—I am not talking about a personal want of harmony—that would be expected from a single circuit. And even where that is not apparent in particular cases, its existence in others is drawn in as a basis for seeking a review upon certiorari. Not unnaturally defeated litigants think that the other judges, if sitting, might have decided differently."

history casts doubt as to whether Congress contemplated such result.

Respectfully submitted.

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OCTOBER 1941.

APPENDIX

Revenue Act of 1928, 45 Stat. 791:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *.

* * * * *

Judicial Code:

SEC. 117. There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established.

* * * * *

(U. S. C., Title 28, Sec. 212.)

SEC. 118 [as amended by the Act of September 14, 1922, 42 Stat. 837, Sec. 6, and the Act of March 3, 1925, 43 Stat. 1116]. There shall be in the second and seventh circuits, respectively, four circuit judges; and in the eighth circuit, six judges; and in each of the other circuits, three circuit judges, to be appointed by the President, by and with the advice and consent of the Senate. All circuit judges shall receive a salary of $8,500.00 a year each, payable monthly. Each circuit judge shall reside within his circuit, and when appointed shall be a resident of the circuit for

which he is appointed. The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law: *Provided*, That nothing in this section shall be construed to prevent any circuit judge holding district court or otherwise, as provided by other sections of the Judicial Code.
(U. S. C., Title 28, Sec. 213.)

* * * * *

SEC. 120. The Chief Justice and the associate justices of the Supreme Court assigned to each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits. In case the Chief Justice or an associate justice of the Supreme Court shall attend at any session of the circuit court of appeals, he shall preside. In the absence of such Chief Justice, or associate justice, the circuit judges in attendance upon the court shall preside in the order of the seniority of their respective commissions. In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignments shall be designated by the court. No judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals (U. S. C., Title 28, Sec. 216).

SEC. 121. The words "circuit justice" and "justice of a circuit" shall be understood to designate the justice of the Supreme Court who is allotted to any circuit; but the word "judge", when applied generally to any circuit, shall be understood to include such justice (U. S. C., Title 28, Sec. 217).

Act of March 1, 1929, 45 Stat. 1414:

Be it enacted by the Senate and House of Representatives of the United States of America in Congres assembled, That the President be, and is hereby, authorized to appoint, by and with the advice and consent of the Senate, an additional circuit judge for the ninth judicial circuit.

SEC. 2. When a vacancy shall occur due to the death, resignation, or retirement of the present senior circuit judge of said circuit, such vacancy shall not be filled unless authorized by Congress.

* * * * *

(U. S. C., Title 28, Sec. 213a.)

Act of June 10, 1930, 46 Stat. 538:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to appoint, by and with the advice and consent of the Senate, an additional circuit judge for the fifth judicial circuit.

* * * * *

(U. S. C., Title 28, Sec. 213c.)

Act of June 10, 1930, 46 Stat. 538:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized

to appoint, by and with the advice and consent of the Senate, an additional circuit judge for the third judicial circuit.

* * * * *

(U. S. C., Title 28, Sec. 213d.)

Act of June 16, 1933, 48 Stat. 310:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is authorized, by and with the advice and consent of the Senate, to appoint a circuit judge to fill the vacancy in the United States Circuit Court of Appeals for the Ninth Judicial Circuit occasioned by the death of Honorable William B. Gilbert. A vacancy occurring at any time in the office of circuit judge referred to in this section is authorized to be filled.

* * * * *

(U. S. C., Title 28, Sec. 213b.)

Act of August 2, 1935, 49 Stat. 508, Sec. 1:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is hereby authorized to appoint, by and with the consent of the Senate, two additional judges of the District Court of the United States for the Southern District of California, who shall possess the same powers, perform the same duties, and receive the same compensation as the present district judges of said district, and one additional judge of the Circuit Court of the United States for the Ninth Judicial Circuit, by and with the advice and consent of the Senate.

* * * * *

(U. S. C., Title 28, Sec. 213e.)

Act of June 24, 1936, 49 Stat. 1903:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States is authorized and directed, by and with the advice and consent of the Senate, to appoint an additional circuit judge of the United States Circuit Court of Appeals for the Third Circuit, who shall possess the same powers, perform the same duties, and receive the same compensation as the present circuit judges of said circuit.

* * * * *

SEC. 3. That this Act shall take effect upon its approval by the President.

* * * * *

(U. S. C. Supp. V, Title 28, Sec. 213d–1.)

Act of April 14, 1937, 50 Stat. 64:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is hereby authorized to appoint, by and with the consent of the Senate, two additional circuit judges for the ninth judicial circuit.

* * * * *

(U. S. C. Supp. V, Title 28, Sec. 213f.)

Act of May 31, 1938, 52 Stat. 584, Sec. 1:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is authorized to appoint, by and with the advice and consent of the Senate, four additional circuit judges, one for each

of the following judicial circuits: Second, fifth, sixth, and seventh.

* * * * *

(U. S. C. Supp. V, Title 28, Sec. 213g.)

Act of May 24, 1940, 54 Stat. 219, Sec. 1:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is authorized to appoint, by and with the advice and consent of the Senate, three additional circuit judges as follows:

(a) One for the sixth circuit;

(b) Two for the eighth circuit.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 262. *Donations by corporations.*— Corporations are not entitled to deduct from gross income contributions or gifts which individuals may deduct under section 23 (n). Donations made by a corporation for purposes connected with the operation of its business, however, when limited to charitable institutions, hospitals, or educational institutions conducted for the benefit of its employees or their dependents are a proper deduction as ordinary and necessary expenses. Donations which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business are allowable deductions from gross income. * * * Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

Rules of the United States Circuit Court of Appeals for the Third Circuit:

RULE 4. CONSTITUTION OF THE COURT. QUORUM.

1. *The Court—Judges Who Constitute It—Number of Judges to Sit.* The court consists of the circuit justice, when in attendance, and of the circuit judges of the circuit who are in active service. District judges and retired circuit judges of the circuit sit in the court when specially designated or assigned as provided by law. Three judges shall sit in the court to hear all matters, except those which the court by special order directs to be heard by the court en banc.

2. *Quorum—Adjournment of Court in Absence of—By Whom Adjourned.* Two judges shall constitute a quorum. If a quorum does not attend on any day appointed for holding a session of the court, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day.

3. *Quorum—Interlocutory Orders in Absence of.* Any judge attending when less than a quorum is present may make all necessary interlocutory orders relating to any matter pending in the court preparatory to the hearing or decision thereof.

RULE 5. ASSIGNMENT OF JUDGES.

1. *By Whom Assigned—Disqualification of Assigned Judge—Designation of Substitute.* The three judges who are to sit in the court at each daily session shall be designated by the senior circuit judge from

time to time with the concurrence of a majority of the circuit judges who are in active service. If a judge so designated is unable to attend or is disqualified to sit in a particular matter the senior circuit judge shall designate an active circuit judge to sit in his stead, or, if no active circuit judge is qualified and able to sit, a retired circuit judge or a district judge of the circuit.

2. *Cases to be Heard by Judges so Assigned.* All matters pending in the court, except further proceedings in appeals and petitions previously heard on the merits and matters directed to be heard by the court en banc, shall be heard and decided by the judges who have thus been assigned to sit in the court at the time of hearing, if practicable.

3. *Exceptions.* Further proceedings in appeals and petitions previously heard on the merits, except petitions for rehearing, shall be heard and determined by the judges who heard the original appeal or petition, if practicable, and may be heard at any time when the court is not otherwise in session. Petitions for rehearing shall be disposed of in the manner provided by Rule 35. If a rehearing is granted the reargument shall be heard by the judges who heard the original argument, if practicable, unless it is directed to be heard by the court en banc.

U. S. GOVERNMENT PRINTING OFFICE 1941

SUPREME COURT OF THE UNITED STATES.

No. 34.—October Term, 1941.

Textile Mills Securities Corporation, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 8, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

This case presents two problems: (1) whether a Circuit Court of Appeals may be composed of all the circuit judges of the circuit in active service, more than three in number, sitting *en banc;* (2) whether petitioner may deduct under the Revenue Act of 1928 (45 Stat. 791) certain expenses incurred by it under contracts in connection with the presentation of claims to Congress on behalf of former enemy aliens for the procurement and enactment of amendatory legislation authorizing the payment of the claims. We granted the petition for certiorari because of the public importance of the first problem and the contrariety of the views of the court below (117 F. 2d 62) and judges of the Circuit Court of Appeals for the Ninth Circuit (*Lang's Estate* v. *Commissioner*, 97 F. 2d 867) as respects its solution.

First: There are five circuit judges,[1] in active service,[2] of the Circuit Court of Appeals for the Third Circuit. All five heard and decided this case. Though they divided three to two on the deductibility of the expenses in question, they were unanimous in the conclusion that five were authorized to hear and decide the case.[3]

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[1] Judicial Code § 118, 28 U. S. C. § 212; Act of June 10, 1930, c. 438, 46 Stat. 538, 28 U. S. C. § 213d; Act of June 24, 1936, c. 753, 49 Stat. 1903, 28 U. S. C. § 213d-1.

[2] As distinguished from judges retired under the provision of § 260 of the Judicial Code, 28 U. S. C. § 375.

[3] The Circuit Court of Appeals for the Third Circuit has promulgated rules in accord with that view. Rule 4(1) provides: "The court consists of the circuit justice, when in attendance, and of the circuit judges of the circuit who are in active service. District judges and retired circuit judges of the circuit sit in the court when specially designated or assigned as provided by law. Three judges shall sit in the court to hear all matters, except those which the court by special order directs to be heard by the court en banc."

The problem arises because § 117 of the Judicial Code (28 U. S. C. § 212; 36 Stat. 1131) provides that "There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established." That provision derives from § 2 of the Act of March 3, 1891, 26 Stat. 826, which established the circuit court of appeals.[4] Though Congress by that Act created these new courts it did not make provision for the appointment to them of a new group of judges. It provided, however, by § 3 of that Act that the Chief Justice and Associate Justices of the Supreme Court assigned to each circuit and the circuit judges and district judges within each circuit "shall be competent to sit as judges of the circuit court of appeals within their respective circuits." Thus it is apparent that the newly created circuit court of appeals was to be composed of only three judges[5] who were to be drawn from the three existing groups of judges—the circuit justice, the circuit judges, and the district judges.

That arrangement continued until enactment of the Judicial Code. Act of March 3, 1911, c. 231, 36 Stat. 1087. The Judicial Code abolished the existing circuit courts. § 297. It carried over into § 117 without substantial change the provision of § 2 of the Act of March 3, 1891 that there should be a circuit court of appeals in each circuit "which shall consist of three judges". Though this section was said merely to represent existing law,[6] § 118 of the Judicial Code provided for four circuit judges in the Second, Seventh, and Eighth Circuits, two in the Fourth Circuit, and three in each of the others. An anomalous situation was presented if § 117 were to be taken at that juncture as meaning that

[4] Sec. 2 provided in part: "That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established."

[5] Sec. 3 of that Act provided: "In case the full court at any time shall not be made up by the attendance of the Chief-Justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order of provision among the district judges as either by general or particular assignment shall be designated by the court . . . . ." And it should be noted that after the passage of the Act of March 3, 1891, there were three circuit judges in the Second Circuit and two in each of the others. Act of April 10, 1869, c. 22, § 2, 16 Stat. 44; Act of March 3, 1887, c. 347, 24 Stat. 492; Act of March 3, 1891, c. 517, § 1, 26 Stat. 826.

[6] S. Rep. No. 388, 61st Cong., 2d Sess., Pt. 1, p. 49; Pt. 2, p. 31[illegible]

the circuit court of appeals would continue to be composed of only three, in face of the fact that there were more than three circuit judges in some circuits. Though § 3 of the Act of March 3, 1891, made the circuit judges "competent to sit as judges of the circuit court of appeals within their respective circuits", § 120 of the Judicial Code into which the provisions of § 3 were carried eliminated the circuit judges from the groups of judges "competent to sit". Yet it retained the provision that the circuit justices and the district judges were so qualified. We agree, however, with the view of the court below that the circuit judges became *ex officio* judges of the respective circuit courts of appeal when the circuit courts were abolished. Though § 120 did not designate them as "competent to sit", its other provisions made clear that they were intended to sit. Thus, it was provided that the district judges should be drawn upon only in case the court could not be made up by the circuit justices and the circuit judges.[7] Yet if § 117 were to be read literally, the circuit court of appeals was to "consist" of only three judges in spite of the fact that Congress had already provided in some circuits for more than three circuit judges. Clearly where there were four, all could not be members of a court of three. Yet there was plainly inferable a Congressional purpose to constitute in some circuits a circuit court of appeals of four judges.[8]

Any doubts on that score[9] were resolved by the Act of January 13, 1912, c. 9, 37 Stat. 52, which amended § 118 of the Judicial Code by the addition of the provision that "The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law." Senator Sutherland who had

[7] "In case the Chief Justice or an associate justice of the Supreme Court shall attend at any session of the circuit court of appeals, he shall preside. In the absence of such Chief Justice, or associate justice, the circuit judges in attendance upon the court shall preside in the order of the seniority of their respective commissions. In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court . . . . ."

[8] Thus the Senate Report, *supra* note 6, in speaking of § 118 (§ 116 in the bill) stated, p. 50: " . . . the section states in concise language the number of judges now provided by law for the several judicial circuits."

[9] See the letter by Albert H. Walker in 74 Central L. J. 12.

charge of the bill in the Senate stated on the floor: "It makes no change whatever in the existing law except to make it clear that the circuit judges in the various circuits of the United States shall constitute the circuit court of appeals."[10] The purpose seems plain: the size of each circuit court of appeals was not to be less than the number of circuit judges authorized by law.[11]

And so we reach the question as to whether the avowed purpose of § 118 was defeated by § 117. We do not think it was.

That purpose was not thwarted by the provision in the 1912 amendment to § 118 that "it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law." It has been suggested that "according to law" refers to § 117. In our view, however, it is the time of the sitting which is to be "according to law". Hence the reference must be to § 126 of the Judicial Code (28 U. S. C. § 223) which regulates the times when the circuit courts of appeal shall sit.

If § 117 could reasonably be construed to provide that the court, *when sitting*, should consist of three judges drawn from a panel of such larger number as might from time to time be authorized, reconciliation with § 118 would be obvious. Sec. 117, however

[10] 47 Cong. Rec., Pt. 3, p. 2736. Senator Sutherland also said: "It has been thought, as I said, that the existing law did not make it quite clear that the circuit judges shall be the constituent members of the circuit court of appeals, and it is to remove that doubt, and that only, that this bill has been reported from the Judiciary Committee." *Id.*, p. 2736. H. Rep. No. 199, 62d Cong., 2d Sess., stated, "This bill deals with a defect in existing law. It makes it clear that the circuit judges shall constitute the circuit court of appeals." And see the statements on the floor of the House by Representative Clayton, chairman of the House Judiciary Committee (48 Cong. Rec. Pt. 1, p. 667) and Representative Moon, chairman of the House Committee on the Revisions of the Laws, who had been in charge of the House bill providing for the Judicial Code. *Id.*, p. 668.

Possible inferences looking the other way are such statements by Representative Mann that "in those circuits where there were four circuit judges, one of them might be put at work in the district court." 48 Cong. Rec., Pt. 1, p. 667. And see 48 Cong. Rec., Pt. 2, p. 1272. Yet such statements are not inconsistent with the conclusion that while the ordinary complement of circuit judges would be three, all might sit.

[11] In this connection it should be noted that § 120 of the Judicial Code makes the "Chief Justice and the associate justices of the Supreme Court assigned to each circuit . . . competent to sit as judges of the circuit court of appeals within their respective circuits." Thus while the circuit court of appeals is composed primarily of circuit judges, the circuit justice is made a "component part" of that court. See statement by Representative Moon, *op. cit., supra*, note 10, p. 668.

contains no such qualification. And since it establishes the court as a "court of record, with appellate jurisdiction", it cannot readily be inferred that the provision for three judges is a limitation only on the number who may hear and decide a case. There are numerous functions of the court, as a "court of record, with appellate jurisdiction", other than hearing and deciding appeals. Under the Judicial Code these embrace prescribing the form of writs and other process and the form and style of its seal (§ 122); the making of rules and regulations (§ 122); the appointment of a clerk (§ 124) and the approval of the appointment and removal of deputy clerks (§ 125); and the fixing of the "times" when court shall be held. § 126. Furthermore, those various sections of the Judicial Code provide that each of these functions shall be performed by the "court". In that connection it should be noted that most of them derive, as does § 117, from § 2 of the Act of March 3, 1891. The first sentence of § 2 provided that the court "shall consist of three judges". The next sentence stated that "Such court shall prescribe the form and style of its seal and the form of writs and other process and procedure", etc. In that setting it is difficult to perceive how the word "court" in the second sentence was used in a different sense than in the preceding sentence. And we look in vain for any indication[12] that when those separate sentences were sectionalized in the Code, they acquired a meaning which they did not have in § 2 of the Act of March 3, 1891.

We cannot conclude, however, that the word "court" as used in those other provisions of the Judicial Code means only three judges. That would not only produce a most awkward situation; it would on *all* matters disenfranchise some circuit judges against the clear intendment of § 118. Nor can we conclude that the word "court" means only three judges when the court is sitting, but all the judges when other functions are performed. Certainly there is no specific authority for that construction. And it is difficult to reach that conclusion by inference. For to do so would be to imply that Congress prohibited some circuit judges from participation in the most important function of the "court" (the hearing and the decision of appeals), though allowing all of them

[12] See, 122 of the Judicial Code (§ 120 in the bill) giving the court power to prescribe the form of writs and other process and the form and style of its seal, and the power to make rules and regulations was stated in S. Rep. No. 388, supra, note 6, p. 31, to represent "existing law".

to perform the other functions. Such a prohibition as respects the ordinary responsibilities of a judicial office should be inferred only under compelling necessity, since a court usually will consist of all the judges appointed to it. That necessity is not present here. The ambiguity in the statute is doubtless the product of inadvertence. Though the problem of construction is beset with difficulties, the conclusion that § 117 provides merely the permissible complement of judges for a circuit court of appeals results in greater harmony in the statutory scheme[13] than if the language of § 117 is taken too literally. And any sacrifice of literalness for common sense does no violence to the history of § 117. That history is largely negative in the sense that there is no clear statement by sponsors of this legislation that § 118 read in light of § 117 prevents the conclusion which we have reached.[14]

[13] It is suggested by respondent that if the Circuit Court of Appeals may sit *en banc*, difficulties arise in connection with that provision of § 120 of the Judicial Code which reads: "In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court . . . . ." The difficulty suggested is that § 120 would imply that, if all the circuit judges compose the "court", then district judges should be called in whenever the court was composed of less than that number. And the argument goes further and suggests that since the circuit justice is "competent to sit" (see note 11, *supra*) then a district court judge could be brought in, when the circuit justice is absent, to make up the "full court" even though all circuit judges sat. The answer, however, is that "full court" as used in § 120 refers to the court which contains the permissible complement of judges as distinguished from a quorum of two. Under our interpretation a bench of three judges is the permissible complement under § 117.

[14] Beginning in 1938 the Judicial Conference of Senior Circuit Judges recommended an amendment to the Code which would enable a majority of the circuit judges in circuits where there were more than three to provide for a court of more than three judges. Report of the Attorney General (1938) p. 23; *id.* (1939) pp. 15-16; Report of the Judicial Conference of Senior Circuit Judges (1940) p. 7. A bill was introduced during the present session of Congress in both the House (H. R. 3390) and the Senate (S. 1053) to amend § 117 of the Judicial Code by adding thereto the following: "Provided, That, in a circuit where there are more than three circuit judges, the majority of the circuit judges may provide for a court of all the active and available circuit judges of the circuit to sit in banc for the hearing of particular cases, when in their opinion such action is advisable."

This bill has passed the House. 87 Cong. Rec. 8328. In the House, the Committee on the Judiciary reported the bill favorably (H. Rep. No. 1246, 77th Cong., 1st Sess.) stating:

"Under existing law provision is made that there shall be in each circuit a circuit court of appeals which shall consist of three judges, of whom two shall constitute a quorum. The bill adds a provision that in a circuit where there are more than three circuit judges, the majority of the circuit judges may provide for a court of all the active and available circuit judges of the

Certainly the result reached makes for more effective judicial administration.[15] Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases. Such considerations are, of course, not for us to weigh in case Congress has devised a system where the judges of a court are prohibited from sitting *en banc*. But where, as here, the case on the statute is not foreclosed, they aid in tipping the scales in favor of the more practicable interpretation.

Second: The expenses in question are sought to be deducted as "ordinary and necessary expenses" within the meaning of § 23(a) of the Revenue Act of 1928. Petitioner, a Delaware corporation, was employed to represent certain German textile interests, whose properties in this country had been seized during the World War under the provisions of the Trading with the Enemy Act. 40 Stat. 411. Petitioner's employment was made with a view towards procuring legislation which would permit ultimate recovery of the properties. The estimated aggregate value of the properties was $60,000,000. Petitioner was to be compensated on a percentage basis in case it was successful. It, however, was to bear all the costs and expenses. Petitioner launched its campaign. A publicist was retained to arrange for speeches, news items, and editorial comment. Two legal experts were retained to prepare propaganda concerning international relations, treaty

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circuit to sit in banc for the hearing of particular cases, when in their opinion such action is advisable.

"If the court can sit in banc the situation where two three-judge courts may react, conflicting conclusions is obviated. It also will obviate the situation where there are seven members of the court and as sometimes happens a decision of two judges (there having been a dissent) sets the precedent for the remaining judges. A similar result would be avoided with a court of five judges.

"It seems desirable that where the judges feel it advisable they might sit in banc for hearing particular cases. Legislation to this effect has been recommended by the judicial conference of senior circuit judges since 1938, and at its January 1941 session the conference approved the form of the present bill."

But we do not deduce that this effort at clarification was or purported to be any definitive interpretation that § 117 as it stands prohibits a circuit court of appeals of more than three judges from sitting *en banc*.

[15] See H. Rep. No. 1246, *supra*, note 14; 69 Central L. J. 217. And see the testimony of Chief Justice Taft and Mr. Justice Van Devanter, Hearings, Committee on the Judiciary, House of Representatives, 70th Cong., 2d Sess., Serial 23, Pt. 2, on H. R. 5690, 13567, 13757, pp. 69, 72.

rights and the policy of this nation as respects alien property in time of war. The objective of the campaign was accomplished by the passage of the Settlement of War Claims Act of 1928, 45 Stat. 254. Deductions for the amount paid to the publicist and the two lawyers were taken in 1929 and 1930, thereby producing a net loss in each of those years. Pursuant to § 117 of the 1928 Act, the net loss was carried forward two years and applied against income for 1931. The Commissioner disallowed the deductions and determined a deficiency. The Board of Tax Appeals disagreed, holding that there was no deficiency. 38 B. T. A. 623. The Circuit Court of Appeals reversed the Board.

We agree that the expenses in question were not deductible. Art. 262 of Treasury Regulations 74, promulgated under the 1928 Act was entitled "Donations by corporations" and provided:

"Corporations are not entitled to deduct from gross income contributions or gifts which individuals may deduct under section 23(n). Donations made by a corporation for purposes connected with the operation of its business, however, when limited to charitable institutions, hospitals, or educational institutions conducted for the benefit of its employees or their dependents are a proper deduction as ordinary and necessary expenses. Donations which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business are allowable deductions from gross income. For example, a street railway corporation may donate a sum of money to an organization intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people using the cars. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income."

If this is a valid and applicable regulation, the sums in question were not deductible as "ordinary and necessary expenses" under § 23(a), since they clearly run afoul of the prohibition in the last sentence of the regulation.

Plainly, the regulation was applicable. The ban against deductions of amounts spent for "lobbying" as "ordinary and necessary" expenses of a corporation derived from a Treasury Decision in 1915. T. D. 2137, 17 Treas. Dec., Int. Rev., pp. 48, 57-58. That prohibition was carried into Art. 143 of Treasury Regulations 33 (Revised, 1918) under the heading of "Expenses" in the secti-

on "Deductions".[16] Beginning in 1921 the regulation was entitled "Donations". (Art. 562, Treasury Regulations 45.) And in the regulations here in question Art. 262 appeared under § 23(n) which covered "Charitable and other contributions" by individuals. It assumed that form and content in 1921 and appeared since then without change in all successive regulations.[17] Sec. 23(n) and § 23(a) both deal with deductions; and a "donation" by a corporation though not deductible under the former might be under the latter. Art. 262 purports to specify when a certain type of expenditure or donation by a corporation may or may not be deducted as an "ordinary and necessary" expense. The argument that it was not applicable because it was not specifically incorporated under § 23(a) is frivolous.

Petitioner's argument that the regulation is invalid likewise lacks substance. The words "ordinary and necessary" are not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation. The numerous cases which have come to this Court on that issue bear witness to that. *Welch* v. *Helvering*, 290 U. S. 111; *Deputy* v. *du Pont*, 308 U. S. 488, and cases cited. Nor has the administrative agency usurped the legislative function by carving out this special group of expenses and making them non-deductible. We fail to find any indication that such a course contravened any Congressional policy.[18] Contracts to spread such insidious influences through legislative halls have long been condemned. *Trist* v. *Child*, 21 Wall. 441; *Hazeltor* v. *Sheckells*, 202 U. S. 71. Whether the precise arrangement here in question would violate the rule of those cases is not material. The point is that the general policy indicated by those cases need not be disregarded by the rule-making authority

[16] Art. 143 provided: "Lobbying expenses.—Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, and contributions for campaign expenses are held not to be an ordinary and necessary expense in the operation and maintenance of the business of a corporation, and are therefore not deductible from gross income in arriving at the net income upon which the income tax is computed."

[17] Art. 562, Regulations 62, Revenue Act of 1921; Art. 562, Regulations 65, Revenue Act of 1924; Art. 562, Regulations 69, Revenue Act of 1926; Art. 562, Regulations 74, Revenue Act of 1928.

[18] In the Revenue Act of 1936 (26 U. S. C. § 23(q), 49 Stat. 1648) Congress specifically provided for deductions of certain contributions by corporations to specified corporations, trusts, funds, or foundations, "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation". And see the Revenue Act of 1938, 26 U. S. C. § 23(q), 52 Stat. 447.

in its segregation of non-deductible expenses. There is no reason why, in absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction. The exclusion of the latter from "ordinary and necessary" expenses certainly does no violence to the statutory language. The general policy being clear it is not for us to say that the line was too strictly drawn.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or disposition of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.